

June 21, 1955

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SEP 22 1998

CONCORD, N.H.

Mr. Stanton C. Otis, Right-of-Way Engineer
Department of Public Works and Highways
State House Annex
Concord, N. H.

Re: Rye (Straw's Point) T.L.R.
#14,200 - P - 2449 / Zoning
Laws

Dear Mr. Otis:

In reply to your communication of June 2, 1955, with enclosures, wherein you inquire concerning the obligation of the state where local zoning laws, particularly those relating to setback of houses, are involved, "to abide by local zoning laws" I advise as follows:

The right of the state to condemn zoned property, notwithstanding that the zoning municipality may have an interest therein by virtue of such zoning, is based on the supremacy of the state. Except for property used in its governmental capacity, such as town hall, etc., rights in property held by a municipality stand on the same footing as private property. Jahr on Eminent Domain, s. 23, p. 40 and cases cited.

The existence or non-existence of a zoning ordinance affects merely the value of the private property condemned. Evidence of zoning may operate to either increase or decrease the value of property taken depending upon the manner in which the court considers it. Basically, zoning is an exercise of police power which has limited the owner's authority to use his land or other property. It is a noncompensable restriction of use.

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Even though under our law an owner generally is entitled to have his land or other property considered for its most advantageous use if he is in an area zoned for purely residence buildings and there is little actual likelihood of an immediately foreseeable change in the zoning ordinance he cannot show suitability of his premises for an industrial site even though such use might put a value on his land ten times what his land would be worth as a residence. A landowner in seeking damages upon an appeal of eminent domain may point to his property's "freedom from inhibited influence of zoning regulations." Nichols on Eminent Domain, s. 12:322. On the other hand, if after several years of zoning a community has been built up so that the owner's property, constructed in accordance with the regulations, is to be rendered less desirable by reason of its variance from other neighboring structures caused by taking and construction of the public improvement such evidence of value is considered in the before value of the premises as well as in the after taking and construction value. This is a matter only between the landowner and the state. Long Beach City High School Dist. v. Stewart, 30 Cal (2d) 763, 185 P. (2d) 585, 173 ALR 249; Los Angeles City High School Dist. v. Hyatt, 79 Cal App. 270, 249 P. 221; Beverly Hills v. Anger, 127 Cal App. 223, 15 P (2d) 867; State ex rel McKolvey v. Styner, 58 Idaho 253, 72 P (2d) 699.

Where the power of eminent domain is equal, such as where a municipality would be condemning part of its park land for a town highway, the question of which use serves the greatest public need controls, namely, whether it should be park or highway. This question of comparing uses does not arise in cases where the state takes zoned private real estate.

Very Truly yours,

George F. Nelson
Assistant Attorney General

GFN:L